IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 478 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

STATE OF GUJARAT

Versus

SUMAR JUMA HALEPATRA & ANR.

Appearance:

Shri M.A. Bukhari, Additional Public Prosecutor, for the Appellant-State

Shri Y.S. Mankad, Advocate, for Respondent-Accused No. 1

Shri J.B. Dastoor, Advocate, for Respondent-Accused No. 2

CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 07/10/96

ORAL JUDGEMENT

The order of acquittal passed by the learned Chief Judicial Magistrate of Kutch at Bhuj on 5th

February 1993 in Criminal Case No. 1888 of 1991 is under challenge in this appeal by leave of this Court under sec. 378 of the Code of Criminal Procedure, 1973 (the Code for brief). By his impugned order, the learned trial Magistrate has acquitted the respondents herein of the offence punishable under sec. 25(1B)(a) of the Arms Act, 1959 (the Act for brief).

2. The facts giving rise to this appeal move in a narrow compass. At about 9.45 a.m. on 15th April 1991 one country-made fire-arm was found from respondent-accused No.1 and it was found to have been sold by respondent-accused No.2 herein to him. Thereupon the necessary complaint was filed against both the respondents herein and, after completion of investigation, the charge-sheet was submitted to the Court of the Chief Judicial Magistrate of Kutch at Bhuj on 23rd July 1991. It came to be registered as Criminal Case No. 1888 of 1991. The charge against the respondents-accused was framed on 15th May 1992 at Ex. 2 on the record of the trial court. Neither accused pleaded guilty to the charge. They were thereupon tried. It appears that the pancha witnesses were examined at trial. It appears that no other witness on behalf of the prosecution was kept present or remained present despite service of witness summons to them. It appears that certain opportunities were given to the prosecution for production of witnesses but to no avail. Thereupon presumably out of exasperation the learned trial magistrate closed the prosecution evidence and, by his order passed on 5th February 1993 in the aforesaid criminal case, acquitted the respondents herein of the offence with which they were charged. The aggrieved prosecution has thereupon by leave of this Court invoked its appellate jurisdiction for questioning the correctness of the aforesaid order of acquittal passed by the learned trial Magistrate.

3. Learned Additional Public Prosecutor Shri Bukhari for the appellant-State has submitted that the learned trial Magistrate does not seem to have followed the well-settled principles of law in this case and it has resulted in miscarriage of justice. According to learned Additional Public Prosecutor Shri Bukhari for the appellant-State, the learned trial Magistrate ought to have secured presence of witnesses on behalf of the prosecution by issuing bailable warrants and if necessary non-bailable warrants according to well-settled principles of law in that regard. As against this, both learned Advocates Shri Mankad and Shri Dastoor have invited my attention to the notings in the rojkam that

warrants for securing attendance of certain witnesses were issued and they were served and yet the witnesses did not remain present. According to both the learned Advocates for the respondents-accused, the learned trial Magistrate was justified in passing the impugned order of acquittal on the facts and in the circumstances of the case.

4. I think the rojkam in this case is quite misleading. Its author presumably does not know the distinction between a summons and a warrant. It transpires from the material on record that on a couple of occasions witness summonses were issued for securing attendance of certain prosecution witnesses at trial. The record does not show issue of warrants of any kind whatsoever for securing their attendance. If warrants, bailable or non-bailable, for securing attendance of witnesses were issued and were served, the prosecution would not have failed to keep them present on the returnable date. It appears that the author of the rojkam has confused a witness summons with a warrant for securing attendance of witnesses.

5. With respect, the learned trial Magistrate has acted contrary to the well-settled principles of law with respect to non-production of witnesses by and on behalf of the prosecution agency at trial. It has been held by this Court in its numerous decisions that the court would not be a helpless onlooker or spectator in such circumstances. It has to activate itself. It has to act with the necessary drive and initiative in the matter. If the prosecution does not co-operate in keeping its witnesses present at trial, the learned trial Magistrate has to issue bailable warrants for securing their attendance in the first instance and to issue even non-bailable warrants for securing their attendance if bailable warrants do not serve the purpose. The latest ruling on the point is the one rendered by the Division Bench of this Court in the case of State of Gujarat v. Rajendrasinh Ramjansinh and others reported in III(1996) C.C.R. 152. The position of law has clearly been highlighted therein. The Division Bench of this Court has given enough guidelines as to what the presiding officer of a criminal court has to do when faced with a situation where it does not get enough co-operation from the prosecution agency by keeping its witnesses present at trial. So many rulings of this Court have been referred to in the aforesaid latest Division Bench ruling of this Court in that regard. It appears that the learned trial Magistrate has remained unmindful of the law on the subject declared by this Court in not very

remote past.

6. In view of my aforesaid discussion, I am of the opinion that the impugned order of acquittal cannot be sustained in law. It has to be quashed and set aside. The matter will have to be remanded to the learned trial Magistrate for restoration of the proceeding to file and for his taking action according to law in the light of the aforesaid Division Bench ruling of this Court.

7. In the result, this appeal is accepted. The order passed by the learned Chief Judicial Magistrate of Kutch at Bhuj on 5th February 1993 in Criminal Case No. 1888 of 1991 is quashed and set aside. The matter is remanded to the learned Chief Judicial Magistrate of Kutch at Bhuj for restoration of the proceeding to file and for his proceeding according to law in the light of this judgment of mine.
